

WRITTEN TESTIMONY OF EMMETT E. LEE LOY,
A NATIVE HAWAIIAN AS DEFINED IN THE HAWAIIAN HOMES
COMMISSION ACT OF 1920,
BEFORE THE FEDERAL HEARINGS ON RECONCILIATION
AS CALLED FOR BY P. L. 103-150,
HELD IN THE HAWAIIAN ISLANDS
FROM DECEMBER 4, 1999 TO DECEMBER 13, 1999

Aloha and welcome to Hawaii, Mr. John Berry, Assistant Secretary, U.S. Department of Interior and Mr. Mark Van Norman, Director, Office of Tribal Justice, U.S. Department of Justice.

My name is Emmett E. Lee Loy, and I am a native Hawaiian as defined in the Hawaiian Homes Commission Act ("HHCA") of 1920,¹ and a beneficiary of the Admissions Act of 1959,² § 5 (f) land trust. I am an attorney licensed to practice in the U.S. Federal District Court of Hawaii and before the Supreme Court of the State of Hawaii.

I am a graduate of the University of Colorado School of Law (1991), where I studied Federal-Indian Law and Federal-Public Land Law under Professor Charles F. Wilkinson; Water Law under Professor David Getches; and New Zealand Federal-Maori Law, the Treaty of Waitangi of 1848, under Professor Richard Collins.

I am a U.S. Army veteran; a former intern with the U.S. Senate Select Committee on Indian Affairs in Washington, D.C.; law clerk with the U.S. Department of Justice Indian Resources Section in Washington, D.C.; law clerk with the Native American Rights Fund (NARF) in Boulder Colorado; Deputy Public Defender for the State of Hawaii; and, now in private law practice seeking full implementation of the HHCA of 1920 and the Admissions Act of 1959, § 5(f) public land trust.

In making this record for you two, the Secretary of the Interior, the Attorney General, the President of the United

¹ Pub. L. No. 67-34, 42 Stat. 108 (1921) ("HHCA"), i.e. "not less than one-half part of the blood of the races of people inhabiting the Hawaiian islands previous to 1778."

² Pub. L. No. 86-3, 73 Stat. 4 § 5(f) (1959).

States, as well as the People of the United States through their Congress, there are a few preliminary matters we need to clear up:

PRELIMINARY MATTERS

1. Do not change the blood quantum or qualifications or criteria of the beneficiaries identified and treated under the HHCA of 1920, until the United States fulfills its obligations and oversees and insures that the State of Hawaii finally and fully implements the HHCA and § 5(f) land trusts.
2. The classification of "native Hawaiians" as beneficiaries to the Hawaiian Homes Commission Act and § 5(f) trust is not a racial classification. It is a classification based upon kinship to a group of people who were unjustly and wrongfully deprived of their one-third undivided interest in 1.4 million acres of land title to which is now held by the State of Hawaii.³
3. The definition was crafted in a way to compensate the heirs of those people who had lost their land when a Western legal system was imposed upon them against their will. The benefits conferred by the HHCA and the § 5(f) trust upon "native Hawaiians" are no more a racial classification than the law providing compensation to Japanese internees during World War II.
4. Mr. John Berry ("Berry") showed complete insensitivity when at the Maui island reconciliation hearing Berry asked the crowd, "Let's see a show of hands as to those who would like to lower the blood quantum for purposes of HHCA leases." Berry is either stupid, (which I doubt, because it takes some wits to get into the Department of Interior) or does not understand what the real struggle is about.
5. Although the definition of a native Hawaiian, as defined in the HHCA, was created by Congress in 1920, such definition has been vigorously defended by the

³No. 98-818, IN THE Supreme Court of the United States, Harold F. Rice, Petitioner, v. Benjamin Cayetano, Governor of the State of Hawaii, Respondent. On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Brief Of Amici Curiae, The Hou Hawaiians and Maui Loa, Native Hawaiian, Beneficiaries Walter R. Schoettle, Esq., (1999), pgs. 3-4.

beneficiaries, and therefore, **ADOPTED by ESTOPPEL** as the native Hawaiian beneficiaries own definition.

6. Do not confuse the property right belonging solely to the native tenants or makaaainana caste, with being the same property right belonging to the Crown, under the Mahele of 1848.
7. Do not confuse the property right belonging solely to the native tenants or makaaainana caste, with being the same thing as a claimed political injury to all subjects of the Monarchy including the Konohiki's that got their one-third share, resulting from the overthrow in 1893.
8. Since Hawaii achieved Statehood in 1959---for over 40 years----the United States has callously neglected the plight of the last critical mass of Hawaiian native tenants or makaaainana community, as the State of Hawaii has victimized the native Hawaiian community; stolen lands from the native Hawaiian community; deprived individuals of this native Hawaiian community their lands under the HHCA, and in so many other countless ways the State of Hawaii has abused the beneficiaries with complete impunity, free from any fear of retribution or the filing of a breach of trust suit by the impotent U.S. Solicitor's Office of the United States.
9. This distinct community of higher and full blood quantum native Hawaiians are teetering on the edge of existence. We are in a very real struggle to survive on remnants of our undivided share of ancestral lands identified in the Mahele of 1848, and now encumbered in the HHCA and \$ 5 (f) land trusts.
10. The United States has allowed its State of Hawaii to, alternately, deprive beneficiaries of their lands under the HHCA, while hoarding the same beneficiary's monies derived from the \$ 5(f) trust under the Office of Hawaiian Affairs ("OHA").
11. At this writing, over 30,000 qualified beneficiaries continue to languish on the State of Hawaii's Department of Hawaiian Home Lands (DHHL) waiting list, while the United States has ignored the plight of the native Hawaiians that Congress moved to especially

treat for the mass dispossession of the common native tenant or makaaianana caste from their one third share of the all the lands in Hawaii, since the Mahele of 1848. Many native Hawaiians have died on the State of Hawaii Department of Hawaiian Home Lands ("DHHL") waiting list, never having received what Congress set aside for them nearly 80 years ago.

12. In P.L. 103-150, the United States apologizes to the wrong party. The proper party is the native tenants or makaaianana caste that were dispossessed under the Monarchy in 1848; remain dispossessed under the Monarchy from 1848 until 1893; and continue to remain dispossessed of their lands under the State of Hawaii Department of Hawaiian Home Lands waiting list.
13. History only repeats itself for those who forget. Please take a real close look as to the compelling governmental interest expressed by the United States Congress in moving to treat a particular class of persons ---Historically and brutally exploited, and then dispossessed of their ancestral lands in 1848 and subsequently turned into homeless vagrants under the Monarchy--- when the United States enacted the HHCA of 1920.

THE REAL DEAL

Shed any whimsical notions of paradise, swaying palm trees and hula girls. There is one stereotype I want you to remember: the depiction of a seemingly complacent native, barefoot, with a large belly sitting under a coconut tree, while gently strumming an ukulele, with a cold beer within reach, dozing beneath the shade of his coconut hat. This stereotype characterizes the economically poor, landless, native Hawaiian with no where to live. Instead, he is forced to dwell on a public beach --- an ukulele being his only source of entertainment --- as he drinks himself into oblivion to hide the incomprehensible pain of being homeless in his own homeland, suffering while waiting on the DHHL waiting list.

Recall human sacrifices, the severe rules and arbitrary and cruel punishments of the Kapu system, infanticide, incest, brutal exploitation of the makaaianana caste and the harshest reality of the centuries of internecine-

fratricidal warfare conducted at the expense of the makaainana caste.

Consider the caste system itself: One of the most oppressive forms of government or involuntary servitude, amounting to virtual slavery for the makaainana caste.

Who can forget the Great and Grand Theft Larceny of the Mahele of 1848, and the disastrous effects visited upon the already suffering makaainana caste or common native tenant? It seems the United State has forgotten, and the State of Hawaii wants the United States to forget.

Suffering from some inarticulate sensation to feel guilty about something, a few individuals (namely the U.S. Solicitor's Office), suddenly feel guilty about the overthrow of 1893.

The U.S. Solicitor and the Attorney General should feel guilty about their uselessness in assuring the State of Hawaii adheres to, and fully implements the provisions of, the HHCA and § 5(f) land trusts.

You are about to embark on the real deal: The highest rates of homelessness among the higher blood quantum native Hawaiian population; the disproportionate over representation of the higher blood quantum native Hawaiians in the general prison population; the highest rates of cancer, diabetes, depression, alcoholism, drug addiction---all associated with the dismal-socio economic profile which comprises the higher blood quantum native Hawaiian population. We have all of the symptoms associated with a people recovering from centuries of abuse and exploitation, and then, mass dispossession from our ancestral lands under our own "Hawaiian" Monarchy which, in fact, is a copy of the European styled Monarchy. Both bogus.

What we don't have is our lands encumbered in the HHCA and § 5(f), and the State of Hawaii is the perpetrator.

The United States is a culpable too, because it continues to look the other way, while the State of Hawaii has been fleecing the § 5(f) trust and depriving the beneficiaries of those monies to fuel the implementation of the HHCA.

At this writing, over 30,000 qualified native Hawaiian beneficiaries are languishing on the State of Hawaii's DHHL waiting list.

Before you toy around with the idea of treating anybody and everybody with one Hawaiian ancestor ten generations later for some imaginary harm associated with the overthrow of 1893, you better remedy the chronologically earlier disaster of the Mahele of 1848, and the critical mass of higher blood quantum native Hawaiians that continue to suffer under the State of Hawaii's mismanagement of the HHCA of 1920 and the § 5(f) land trusts.

The United States needs to:

- 1) insure the State of Hawaii carries out the Congressional mandate and provisions of the HHCA and the Admissions Act § 5(f) land trusts or
- 2) Bring suit against the State of Hawaii to enforce the said compact and trust, as is provided by § 5(f).

As you sit there listening to everybody, remember this: some native Hawaiians DO NOT wish to return to be ruled under a European styled Monarchy.

And, before the U.S. reaches out to treat a real or imagined injury resulting from the overthrow in 1893, the U.S. had better bring a breach of trust action against the State of Hawaii for its failure to implement the HHCA of 1920 and the Admissions Act Section 5(f) land trust.

Neither the U.S. Attorney General nor the U.S. Solicitor's Office within DOJ has done anything to enforce the provisions of the HHCA and 5(f). Instead, they send you two down here to Hawaii "to talk."

Talk is cheap. We need action. Confused? Bring a suit against the State of Hawaii for breach of trust in failing to carry out the HHCA and § 5(f) land trusts.

The history of the Hawaiian Islands and the plight of the makaainana caste to survive, is not solely limited to the role of the U.S. Government in the overthrow of the Kingdom of Hawaii in 1893, nor U.S. annexation of lands formerly held by the Kingdom of Hawaii in 1898.

These two incidents of 1893 and 1898, historically significant, do not fully account for the property rights belonging solely to the makaaainana caste and their descendants and heirs, and which property rights are vastly distinct and very different from those claimed by the Kingdom of Hawaii.

I. HOW THE MAKAAAINANA WERE DISPOSSESSED UNDER THE MONARCHY AND WHY THE UNITED STATES SHOULD TREAD CAREFULLY

If the United States wishes to reconcile with the native Hawaiians, the United States must first understand exactly what it is seeking to reconcile and with whom such reconciliation should take place.

If the United States thinks it should "give the land back" to the Monarchy, then it must first know exactly whose lands it will be giving back to the Monarchy.

Not all the lands taken from the Monarchy of Hawaii belonged to the Monarchy.

Some of the lands taken from the Monarchy belonged to the native tenants or makaaainana caste, dispossessed of their one-third share of the lands in Hawaii, following the Mahele of 1848.

After the planned failed delivery of lands to the makaaainana caste in 1848, the Kingdom of Hawaii simply stole the makaaainana castes one-third share of the undelivered Mahele lands and converted such lands into "Government Lands."

Worse, the Kingdom of Hawaii failed to treat the dispossessed makaaainana caste for such mass thievery, and the untold suffering visited upon the makaaainana who were transmogrified into homeless wanderers and vagrants by such mass dispossession.

Then the Kingdom passed laws making homelessness a crime, called it vagrancy, arrested the makaaainana, and forced them to build public projects: One example is the wall surrounding Punahou School, the former "Royal" school, which was built from the labor of "homeless vagrants" dispossessed by the Royalty of the Kingdom of Hawaii in the

Mahele of 1848, and then forced into to slave labor as criminals for being homeless.

From 1848 until the overthrow in 1893, the Kingdom of Hawaii habitually failed to treat the makaaainana for its mass dispossession. This calculated neglect from 1848 to 1893, is just the tip of the iceberg in the history of abuses imposed on the makaaainana caste by the ruling alii caste, and which abuses have been imposed on the makaaainana by the alii caste since time immemorial.

II. THE SANDALWOOD TRADE: A DEPICTION OF THE EXPLOITATION OF THE MAKAAAINANA CASTE AND PRECURSOR TO THE DECIMATION OF THE MAKAAAINANA POPULATION

Following centuries of internecine-fratricidal warfare amongst and between the alii caste, and which warfare was conducted at the expense of the common tenants or makaaainana caste, the stage was set for the alii caste to once and for all, decimate the common makaaainana population.

The alii caste historically have been murderous, abusive, jealous of power, and willing to go to any lengths to kill all rivals, including their very own blood relatives to enhance or protect their very own mana or power to rule over the makaaainana as well as other alii they wished to subjugate.

The Hawaiian oral history is full of accounts of the abuses of the alii caste and the suffering of the makaaainana caste. Such abuses were perpetrated under the religious order or "Kapu's" which was the psychological glue that held the caste system together for the alii to continue their abuses.

It is very important to note that it was the common native tenants or members of the makaaainana caste that were required to labor for the alii's food provisions and combat supplies. Evolving over the centuries, the caste system became ever more oppressive, and was the chief tool used to exploit the makaaainana.

At the beginning of the end of the caste system, with the overthrow of the Kapu's in 1819, such a caste system here in the Hawaiian Islands amounted to virtual slavery.

No clearer example of the abuses of the alii caste committing extortion upon, and exploitation of, the makaaainana caste can be found than that of the infamous Sandalwood Trade in the Hawaiian Islands.

The Sandalwood or iliahi, was discovered by Captain Kendrick of the American sloop Lady of Washington between 1791 and 1794.

After being told that sandalwood was a valuable article of trade with the people of China, Kamehameha I ordered his alii caste to order their makaaainana caste to the mountains after this wood.

"This rush of labor to the mountains brought about a scarcity of cultivated food throughout the whole group. The people were forced to eat herbs and tree ferns, hence the famine called Hi-laulele, Haha-pilau, Laulele, Pualele, 'Amau'u, or Hapu'u, from the wild plants resorted to."

Between 1810 and 1825 the trade was at its height. Kotzbue writes in 1825 that he has been told that Americans have purchased sandalwood to the amount of 300,000 Spanish dollars.

On Molokai a hollow is shown shaped like the hold of a ship and said to have been used in old days as a measuring place for a shipload of sandalwood.

"All the people were drawn into service, and the chiefs bought quantities of cloth, and some began to buy ships. The ruling chief of Kauai also secured cloth, muskets, and powder, and became the owner of several ships, two large vessels called Kamohalani and Mikapako and several smaller ones."

The makaaainana caste were so oppressed that they started to pull out all the seedlings of the sandalwood, so that the sandalwood would not grow into full trees, and thereby spare their makaaainana keiki (children) from future slave labor in harvesting the sandalwood. The seething discontent manifested intself with the makaaainana setting fire and destroying whole stands of sandalwood, so that they would not have to be forced to pick it for the greedy, abusive alii, who were trading the sandalwood for trinkets, mirrors, colorful hankerchiefs, rolls of red cloth and other oddities that struck their royal fancy.

III. THE EXPLOITATION OF THE MAKAAINANA CASTE BY THE ALII CASTE AND THE CATAclysmic DESMISE IN THE POPULATION OF THE MAKAAINANA TRIGGERED BY THE ABUSES OF THE ALII

The Hawaiian Homes Commission Act (HHCA) of 1920 is Congress' movement in the field of the national interest to treat a particular class of persons dispossessed since the time of the Mahele of 1848, 45 years before the overthrow.

The State of Hawaii's sudden interest of 1978 to create OHA and decide on its own to treat a brand new class of persons alleging a nebulous political injury, is vastly different from Congress' treatment of the identified beneficiaries under the HHCA and Section 5(f) of the Admissions Act of 1959 (Section 5(f)).

The State is without congressional authority to treat a brand new class of persons alleging a different harm than what Congress is treating under the HHCA and 5(f).

Congress never delegated, but exclusively reserved the power to change the requirements, or lower the blood quantum criteria, of original lessees under the HHCA. OHA is hoarding in excess of \$300 million dollars of the HHCA beneficiaries trust monies, received from the 5(f) revenues from "available lands" and misusing it for and by non-beneficiaries at OHA for political purposes, inconsistent with the provisions of the HHCA.

The unabashed gall of the State of Hawaii to argue that they have a trust relationship with the beneficiaries of the HHCA. Ask any one of the more than 30,000 beneficiaries languishing on the State of Hawaii Department of Hawaiian Home Lands waiting list (some since Statehood in 1959), if they trust the State of Hawaii? What about the ones that died on the waiting list, who is going to ask them? Since the Mahele, we have been ripped off.

Please do not overlook the fact that although the blood quantum was set by Congress in 1920, it has been vigorously defended by the beneficiaries since that time and, by such defense, it has been adopted by the beneficiaries of the HHCA as their own definition by estoppel.

The abuses and exploitation by the alii caste (that ruled for centuries by threats, abuse, murder, extortion and terror), would be highlighted in the alii's effort to exterminate the makaaainana population during the infamous Sandalwood Trade.

The ruling alii caste drove the makaaainana caste like slaves into the hills to denude the forests of iliahi or sandalwood, while starving. Both the makaaainana and the iliahi would end up near extinction caused by the greed of the alii that traded slave labor for trinkets, pieces of red cloth, handkerchiefs and other oddities.

This is the trigger point in the cataclysmic decimation of the makaaainana population that plummeted from a population of about 300,000 to about 40,000 by the time of the inevitable overthrow. If it wasn't for the U.S., the makaaainana would have other-thrown the corrupt monarchy eventually.

In their lust for greed, the alii caste brought in the diseases to the islands by trading with the Europeans.

Never forget that not all native Hawaiian beneficiaries wish to restore to power those people whose ancestors victimized native Hawaiians under the Mahele of 1848.

If "sovereignty" meant decimation for the makaaainana caste, then I am happy to see the corrupt Hawaiian Monarchy go.

What you have to keep in mind is that the alii have already received their share of the Mahele lands and were the ones responsible for not delivering to the makaaainana their share of lands, resulting in mass dispossession in 1848.

The symptoms of such mistreatment manifested itself in native Hawaiians being driven to the urban core to live in squalor. This is what Congress' compelling governmental interest was and still is: to treat the symptoms of the mass dispossession occurring from the Mahele.

The minimal blood quantum, alii type, state-defined Hawaiians are clever and with them in control of our 5(f) monies at OHA, we still live in squalor, dying on the State of Hawaii Department of Hawaiian Home Lands waiting list.

U.S. Solicitor Waxman, useless to native Hawaiians, was too preoccupied with himself to notice the difference between Congress' protected class under the HHCA, and the State of Hawaii's treatment of a very different class of persons, using the beneficiaries of the HHCA's 5(f) monies to accomplish that unlawful purpose. The U.S. Solicitor should be better informed, but his ignorance is consistent with his ignoring beneficiaries dying on the State of Hawaii Department of Hawaiian Home Lands waiting list.

DO NOT LOWER THE BLOOD QUANTUM REQUIREMENTS FOR THE HHCA AND § 5(f) TRUST.

IT WOULD BE A WASTE OF TIME FOR THE UNITED STATES TO TRY TO RESTORE THE MONARCHY, BECAUSE IT WILL BE OVERTHROWN AGAIN, ONLY THIS TIME BY THE NATIVE TENANTS OR MAKAAINANA CASTE DESCENDANTS THAT HAVE HAD ENOUGH OF THEIR ROYAL SCAMS.

Respectfully,

Emmett E. Lee Loy